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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1967

No. 1413

LITTLE RIVER MARINE CONSTRUCTION CO., INC.,

Petitioner,

versus

ALBERT FLAKSA

Respondent.

Reply Brief of Petitioner on Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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STATEMENT

The District Court's action flowed from found failure by Respondent to prepare and thereby prosecute his claim. The Court of Appeals concurred in this finding.

Respondent's attorneys so stated in requesting Petitioner to agree to a proposed continuance of ordered pretrial conference (Pet. App. 15; R. 151, 195).

Respondent's petition for continuance of pre-trial conference stated, without other explanation, his attorneys had been "unable" to complete discovery (Pet. App. 15; R. 138). No discovery had ever been instituted by Respondent before or after the July 10, 1964, order for pre-trial and trial (Pet. App. 15-16) prior to a sham motion to produce and inspect the vessel "Ducky" over a year following the occurrence, which was contrary to the order (Pet. App. 16; R. 42-43) and accompanied the petition for continuance (Pet. App. 15; R. 137).

A comparison of the deposition of Respondent in April, 1964 (eg. R. 112-113, 124, 131), Respondent's belated answers (Pet. App. 15; R. 59, 61-66) to interrogatories 6-7 (R. 51-52), 11-15 (R. 53-54), and Respondent's proposed stipulation (R. 163) subsequent to both the ordered pre-trial conference date of October 19, 1964, (Pet. App. 15; R. 40) and to the ordered hearing thereafter held on October 30, 1964, (Pet. App. 16; R. 147) reflect that only in the latter proposed stipulation is information, including the identity of numerous witnesses, never before disclosed by Respondent.

Lack of excusable neglect, mistake, or inadvertence on the part of the Respondent; and a continued communicated desire on the part of the Petitioner to comply on its part with the pre-trial order as found by the District Court (Pet. App. 15; R. 196-197) and the Court of Appeals (Pet. App. 7-9), is evident from Petitioner's repeated communications to Respondent's attorneys seeking first the answers to its interrogatories and thereafter ordered production of documents (Pet. App. 15; R. 66-67) which in all events were material to the pre-trial meeting of counsel (Pet. App. 15; R. 42).

No allegation exists, nor does the record suggest, that the pre-trial and trial assignments given this case by the July 10, 1964 order were unreasonable, oppressive, or other than a proper management of the case and the District Court's calendar.

Against the record background, the Court of Appeals considered "whether the order was too drastic under the circumstances" (Pet. App. 7); the fault and where it lay was clear (Pet. App. 7-9).

ARGUMENT

The Court of Appeals created and imposed improper criteria upon the authority and exercised sound judicial discretion of the District Court.

A. Creation and Imposition of Improper Criteria.

With a record background of dereliction and failure on the part of Respondent's attorneys and agents at every stage of the proceeding from the time issue was joined (Pet. App. 8), which permeated the reasonable pre-trial and trial assignments, the Court of Appeals improperly created and imposed limiting conditions precedent, of disciplinary action against the erring attorneys or other lesser sanctions, where the facts are not such as to indicate that the litigant is a participant in the fault.

Respondent does not, and cannot, square such criteria for measuring authorized dismissals with prejudice, in the sound exercise of judicial discretion by District Courts, with this Court's decision in **Link v. Wabash R. R. Co.** (1962) 370 U.S. 262, or related cases.

B. **Exercised Sound Judicial Discretion of District Court.**

Measured by proper criteria the District Court exercised sound judicial discretion in defaulting Respondent.

A trial court from personal observation and from knowledge of its calendar is in a better position to judge what justice required under the circumstances than a Court of Appeals from a cold record. A District Court must have broad discretion in the making of trial assignments and in holding parties to assignments reasonably made in the absence of valid grounds for continuance. e.g. **Janousek v. French** (8th Cir., 1961) 287 F2d 616, 622-623.

It is to the interest of everyone concerned with the proper administration of justice that District Courts should move cases forward for trial and dispose of them promptly when they are reached except where clear and compelling reasons supported by unequivocal and detailed facts require some further adjournment. e.g. **Joseph v. Norton Company** (2d Cir., 1959) 273 F2d 65, 67.

Lack of preparation is not a ground for obtaining a continuance, unless there is a valid reason for such lack; and a District Court's evaluation of the parties' diligence in the preparation of a case carries almost commanding weight. e.g. **United States v. Pacific Fruit & Produce Co.** (9th Cir., 1943) 138 F2d 367.

Moreover, an order of dismissal may be granted, notwithstanding the claimant has been stirred into action by the impending dismissal, for subsequent diligence is no excuse for past negligence. e.g. **Hicks v. Bekins Moving & Storage Co.** (9th Cir., 1940) 115 F2d 406.

The instant case is clearly different from the cases relied upon by Respondent, including **Woodham** v. **American Cystoscope Company of Pelham, New York** (5th Cir., 1964) 335 F2d 551, 556, as recognized by the Court of Appeals therein: "There was no want of prosecution by the plaintiff or her attorney. Nor do we have a willful violation of a court order and facts from which it could be inferred that the plaintiff had long been deliberately proceeding in a dilitory fashion".

Excusable neglect, mistake, or inadvertence, found in **Council of Federated Organizations** v. **Mize** (5th Cir., 1964) 339 F2d 899, 900, do not exist here.

International Harvester Co. v. **Rockwell Spring & Axle Co.** (7th Cir., 1964) 339 F2d 949, 952, involved no failure to prosecute, was not at issue, and was a protective action pending outcome of other proceedings in the court of claims.

Failure to file an **ex parte** pre-trial statement due to oversight in reference to a prepared case in **Gamble** v. **Pope A. Talbot** (3d Cir., 1962) 307 F2d 729, and the authority of the court to impose sanctions therefor, is not controling in the instant circumstances.

We are not dealing here with either diligent prosecution or an unauthorized, oppressive, or improper order as was the case in **Padovani** v. **Bruchhausen** (2d Cir., 1961) 293 F2d 546, 548.

Even the dubious case of **Durham** v. **Florida East Coast R. R. Co.** (5th Cir., 1967) 385 F2d 366, 367-368, wherein personal fault of the litigant respecting the "new" evidence was indicated, is not controling here.

Long standing lack of preparation of case before and after July, 1964, order for pre-trial and trial on dates admittedly reasonable, permeating disposal of cases by pre-trial and trial, rendered District Court's action within authority and exercised sound judicial discretion of District Courts measured against established criteria.

The mandatory, artificial, criteria as created and applied by the Court of Appeals renders available, for a price, continuances for which no valid ground exists.

CONCLUSION

Contrary to this Court's Link decision, and contrary to the authority and exercise of sound judicial discretion of District Courts as understood and administered in other Circuits; the decision below is clearly erroneous. This petition for a writ of certiorari should therefore be granted.

Summary reversal is appropriate in this case under this court's practice not only where the law is settled by a prior decision, but also where the action of the Court of Appeals is clearly improper.

Respectfully submitted,

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